CALIFORNIA TRUST REFORM CONSORTIUM
v.
DIRECTOR, OFFICE OF TRUST FUNDS MANAGEMENT,
OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS

IBIA 98-112-A Decided April 30, 1999

Interlocutory appeal from an order holding that an appeal from a contract declination under the Indian Self-Determination Act is not moot.

Affirmed as modified.

1. Appropriations--Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

   An appropriation which states expressly that it is available until expended is an exception to the general rule that an appropriation is available for obligation only during the fiscal year covered by the appropriation. 31 U.S.C. § 1302(c)(2).

2. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Indians: Indian Self-Determination and Education Assistance Act: Generally

   Under section 328 of the FY 1999 Interior Department Appropriations Act, 112 Stat. 2681, 2681-291 (1998), FY 1999 funds may not be used to enter into any new or expanded contract under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, for any activities not previously covered by such a contract. A new contract under this provision is one which did not exist on October 21, 1998.

APPEARANCES: Patti Jamison, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Director, Office of Trust Funds Management, Office of the Special Trustee for American Indians; Crow Munk, Karuk Self-Governance Coordinator, for the California Trust Reform Consortium.

OPINION BY ADMINISTRATIVE JUDGE VOGT

The Director, Office of Trust Funds Management (Director), Office of the Special Trustee for American Indians (OST), seeks review of a February 25, 1999, order issued by Administrative Law Judge Nicholas T. Kuzmack, holding that an appeal filed under 25 C.F.R. Part 900 by the California Trust Reform Consortium (Consortium) is not moot. For the reasons discussed below, the Board affirms Judge Kuzmack's order as modified herein.

Background

The Consortium is comprised of seven California tribes. In December 1997, it submitted a proposal for a contract under the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450-450n, for the purpose of implementing a California Trust Reform Demonstration Project. The proposal was declined by the Director on March 16, 1998, on the grounds that OST had no program corresponding to the one described by the Consortium and therefore no funds for such a program. On June 10, 1998, following an informal conference, the Trust Policy Officer, OST, recommended that the Director's March 16, 1998, decision be affirmed.

The Consortium then appealed to the Board. On July 13, 1998, the Board referred the appeal for a hearing pursuant to 25 C.F.R. § 900.160. The case was assigned to Administrative Law Judge Nicholas T. Kuzmack.

On October 21, 1998, Congress enacted the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year (FY) 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998). The Omnibus Act includes the Department of the Interior and Related Agencies Appropriations Act for FY 1999 (1999 Appropriations Act). 112 Stat. at 2681-232. Section 328 of the 1999 Appropriations Act provides:

> Notwithstanding any other provision of law, none of the funds in this Act may be used to enter into any new or expanded self-determination contract or grant or self-governance compact pursuant to [ISDA] for any activities not previously covered by such contracts, compacts or grants. Nothing in this section precludes the continuation of those specific activities for which self-determination and self-governance contracts, compacts and grants currently exist or the renewal of contracts, compacts and grants for those activities; implementation of section 325 of Public Law 105-83 (111 Stat. 1597); or compliance with 25 U.S.C. 2005.

112 Stat. at 2681-291.

On November 16, 1998, Judge Kuzmack issued an Order to Show Cause as to why this appeal should not be dismissed as moot in light of section 328. Both the Consortium and the Director responded.

In the meantime, on November 23, 1998, Judge Kuzmack dismissed another appeal as moot on the basis of section 328. Pascua Yaqui Tribe of Arizona v. Acting Director, Tucson Area Office, Indian Health Service, Order Granting Appellee's Motion to Dismiss in IBIA 98-61-A (Nov. 23, 1998). That order was appealed to the Department of Health and Human Services Departmental Appeals Board (HHS Appeals Board). On January 12, 1999, HHS Appeals Board Member Donald F. Garrett remanded the case to Judge Kuzmack upon holding that "[t]he use of funds appropriated under the fiscal year 1999 omnibus appropriations bill to enter into any contract with [the Pascua Yaqui Tribe] approved on appeal is not barred by section 328 of that appropriations bill" and that "[the Tribe's] request for hearing is not moot." Pascua Yaqui Tribe of Arizona, Decision No. 1676, Final Decision on Review of Administrative Law Judge Order at 9 (HHS Appeals Board, Jan. 12, 1999). The Indian Health Service (IHS) sought en banc review or reconsideration. The Chair, HHS Appeals Board, referred the request to Mr. Garrett. On February 11, 1999, Mr. Garrett held that IHS had failed to demonstrate any clear error of fact or law. Id., Ruling on Request for Reconsideration (Feb. 11, 1999).

On February 25, 1999, Judge Kuzmack issued an order in this appeal holding that the Consortium's appeal was not moot. He stated in part:

> [The Consortium] presents four arguments why the matter is not moot: (1) its appeal pertains to a contract proposal for funds appropriated in fiscal year (FY) 1998 which are not subject to § 328, (2) if [OST] had properly approved [the Consortium's] contract proposal, a contract would already be established which would not be subject to the moratorium on contracting for new or expanded contracts, (3) [OST] is required by law to ensure maximum participation by [the Consortium] through contracting and/or consultation for programs, services, activities, and functions that [OST] plans to carry out, and (4) the moratorium does not apply because [the Consortium] has already contracted, compacted or received grants to carry out activities comparable to those contained in its contract proposal.
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> Argument (1) has merit. Because the funds appropriated to [OST] in FY 1998 are "to remain available until expended," Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1559 (1997), it is possible that funds appropriated in FY 1998 are still available for allocation to [the Consortium's] contract proposal. [The Consortium] is correct that such funds would not be subject to the § 328 moratorium on using funds appropriated in FY 1999 for new or expanded contracts.
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> Argument (2) has merit. Although [OST] cites my decision in Pascua Yaqui Tribe of Arizona v. Acting Director, Tucson Area Office, Indian Health Service, IBIA 98-61-A, November 23, 1998, dismissing an appeal as moot under § 328, this decision was reversed by the Department of Health and Human Services, Departmental Appeals Board, Appellate Division, in a decision dated

> January 12, 1999, Docket No. A-99-20, Decision No. 1676. In that case the Indian Health Service partially declined an ISDA contract proposal on October 20, 1997. In his January 12, 1999, Decision, Mr. Donald Garrett points out that if the decision of the Indian Health Service is reversed the resulting contract would be treated as if it was a fiscal year 1998 contract and therefore would not be a "new contract" for fiscal year 1999 purposes. While this decision is not binding on the Department of the Interior in the instant case, upon reconsideration, I find that this position has merit.

Judge Kuzmack's Feb. 25, 1999, Order at 2. The Judge rejected the Consortium's third and fourth arguments.

The Director asked Judge Kuzmack to certify his ruling for interlocutory appeal under 43 C.F.R. § 4.28. On March 18, 1999, Judge Kuzmack did so. Upon receipt of his order and the administrative record, the Board issued a preliminary order, stating in part:

> [A]n interlocutory appeal is clearly warranted in this case. Thus, whether an appeal in this case is considered to be authorized by 43 C.F.R. § 4.28 or by necessary inference from 25 C.F.R. Part 900, Subpart L, the Board will accept an interlocutory appeal, if one is filed, and will suspend the hearing on the assumption that 43 C.F.R. § 4.28 applies.

Board's Mar. 22, 1999, Order at 1.

The Director's appeal was received by the Board on April 15, 1999. The Board allowed the Consortium to file a response. That response was received on April 26, 1999. Under 25 C.F.R. § 900.167, the Board has 20 days from April 15, 1999 (or until May 5, 1999), in which to issue a decision in this appeal.

Discussion and Conclusions

The Director contends that Judge Kuzmack erred in determining that:

> 1) In the event the declination is found to be unlawful, the resulting contract would be "treated as if it were a fiscal year 1998 contract" and therefore would not be a "new contract" for fiscal year 1999; and
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> 2) Fiscal Year 1998 funds will be or can be used to enter into Appellant's contract in the event the declination is found unlawful.

Director's Appeal at 3. These contentions correspond to Judge Kuzmack's first two findings, quoted above, although in reverse order.

[1] In his first finding, Judge Kuzmack cited the appropriation for OST in the Department of the Interior and Related Agencies Appropriations Act for FY 1998 (1998 Appropriations Act), Pub. L. No. 105-83, 111 Stat. 1543, 1559 (1997), under which certain funds are "to remain available until expended," and found that "it is possible that funds appropriated in FY 1998 are still available for allocation to [the Consortium's] contract proposal."

The Director contends that Judge Kuzmack misread the OST provision in the 1998 Appropriations Act. She quotes a proviso from that provision which states "[t]hat funds made available to tribes and tribal organizations through contracts or grants obligated during fiscal year 1998, as authorized by [ISDA], shall remain available until expended by the contractor or grantee." In light of this language, she contends that, in order for FY 1998 funds to remain available, they must have been obligated during FY 1998 through contracts or grants.

The Director, however, quotes only a portion of the FY 1998 OST appropriation provision. In its entirety, the provision states:

> OFFICE OF SPECIAL TRUSTEE FOR AMERICAN INDIANS
>
> FEDERAL TRUST PROGRAMS
>
> For operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, $33,907,000, to remain available until expended: Provided, That funds for trust management improvements may be transferred to the Bureau of Indian Affairs: Provided further, That funds made available to tribes and tribal organizations through contracts or grants obligated during fiscal year 1998, as authorized by [ISDA], shall remain available until expended by the contractor or grantee: Provided further, That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

111 Stat. at 1559.

Clearly, it was the first sentence of this provision, rather than the proviso quoted by the Director, upon which Judge Kuzmack relied.

The Director argues that "[i]t is a basic principle of federal appropriations law that funds are available for obligation only during the fiscal year [for] which they were appropriated." Director's Appeal at 9. She argues further that, "[u]nless specifically excepted, most federal

appropriations are fixed for one fiscal year." Id. at n.6. She cites, inter alia, 31 U.S.C. § 1301(c), which provides:

> An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation))
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> (1) is for rivers and harbors, lighthouses, public buildings, or the pay of the Navy and Marine Corps; or
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> (2) expressly provides that it is available after the fiscal year covered by the law in which it appears.

It is apparent that the appropriation provision at issue here falls under 31 U.S.C. § 1301(c)(2) in that it expressly provides that the funds appropriated are to remain available until expended. The provision is thus an exception to the general rule cited by the Director.

The 1997 and 1996 Appropriations Acts contain provisions similar to the one in the 1998 Act. The 1997 Appropriations Act provided appropriations for OST: "For operation of trust programs for Indians by direct expenditure, contracts, cooperative agreements, compacts, and grants, $32,126,000, to remain available until expended for trust funds management." Act of Sept. 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-197. The 1996 Appropriations Act appropriated for OST: "$16,338,000, of which $15,891,000 shall remain available until expended for trust funds management." Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-175. It is possible that similar provisions also appear in earlier appropriations acts.

The 1999 Appropriations Act provides at section 147:

> Appropriations made in this title under the headings Bureau of Indian Affairs and Office of Special Trustee for American Indians and any available unobligated balances from prior appropriations Acts made under the same headings, shall be available for expenditure or transfer for Indian trust management activities pursuant to the Trust Management Improvement Project High Level Implementation Plan.

112 Stat. at 2681-267.

The Conference Report on the 1999 Appropriations Act states that this language is intended to "provide increased flexibility to meet potential unfunded trust management improvement needs." H.R. Conf. Rep. No. 825, 105th Cong., 2d Sess., reprinted in 144 Cong. Rec. H11044, 11376 (daily ed. Oct. 19, 1998). The report continues:

> The language would authorize the use of current year and prior year unobligated funds available under all BIA and OST appropriations accounts for Indian trust

> management improvements pursuant to the Trust Management Project High Level Implementation Plan. The Department will be required to follow Committee reprogramming procedures. Adherence to such reprogramming procedures is required to ensure the allocation of funding by the Committees is preserved, while allowing any available OST and BIA funds to be reprogrammed from areas where they may be no longer necessary or of lower priority due to changed circumstances.

Id.

It is apparent from section 147 and the discussion in the Conference Report that Congress considered certain unobligated funds from prior year appropriations to be still available for use in FY 1999.

Significantly, the Director does not contend here that all of the funds appropriated for OST for FY 1998, 1997, 1996 (or for any earlier years with similarly worded appropriations provisions) have been completely expended. 1/ Even if she had made such a contention, the Board would not decide the question here, because the question would be one of fact, appropriate for resolution at an evidentiary hearing.

The Board affirms Judge Kuzmack's first finding.

[2] In his second finding, Judge Kuzmack relied on the decision of the HHS Appeals Board in Pascua Yaqui Tribe to conclude that, were the Director's decision to be reversed, the resulting contract would be treated as if it were a FY 1998 contract and therefore would not be a "new contract" for FY 1999 purposes. Under this theory, it would not matter whether prior year funds were still available because, if the Consortium succeeded in its appeal, it would be entitled to have its contract funded from FY 1999 appropriations.

Mr. Garrett of the HHS Appeals Board stated:

> IHS made its decision to partially decline the [Pascua Yaqui Tribe's] proposed contract on October 20, 1997. I conclude that any contract approved on appeal

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1/ The Director notes, however, that one of the reasons the Consortium's proposal was declined was that no funds had been appropriated for the program the Consortium sought to operate. She contends that, "[s]ince there were no funds available at the time of declination, the likelihood of funds being available now are remote at best." Director's Appeal at 12.

The question of whether funds are available for the Consortium's program is a central issue in this appeal and is presumably one the Consortium would raise at a hearing. It is conceivable that, even if funds were not available for the Consortium's program at the time of declination, they might be available now as a result of the reprogramming authorized by sec. 147 of the 1999 Appropriations Act.

> should not be viewed as a new fiscal year 1999 contract within the meaning of the appropriations bill but rather as a prior year contract that was unlawfully declined on October 20, 1997. The appeals process authorized by Congress for self-determination contracts would be undercut if an appellant could not receive an approval of its contract proposal that relates back to the declination that is under appeal. If [the Pascua Yaqui Tribe] prevails on appeal on the merits of its proposed contract, it should therefore be entitled to the same contract as if IHS had properly approved its contract in the first instance. Accordingly, I conclude that any contract approved on appeal should not be treated as a new contract for purposes of the appropriations bill but should be treated in precisely the same way as any other contract that was approved in fiscal year 1998. [Footnote omitted.]

Jan. 12, 1999, Final Decision on Review of Administrative Law Judge Order at 5-6.

The Director disagrees with this analysis. She contends that what Mr. Garrett describes here, and thus what Judge Kuzmack approved in his February 25, 1999, order, is a retroactive or phantom shell contract, neither of which is authorized under ISDA. She also contends that, under a plain meaning analysis, the term "new contract" in section 328 means any contract "whose activities were not previously in an existing contract at the time of the bill's enactment," Director's Appeal at 5, and that, because the Consortium "does not have an existing contract for California Trust Reform Demonstration Project activities, upon reversal of the declination, the result would be a new contract and prohibited by section 328." Id. at 6.

The Director argues that the starting point for interpretation of section 328 is the statutory language itself. The Board agrees. The first sentence of section 328 prohibits the use of FY 1999 funds for "any new or expanded [ISDA] contract * * * for any activities not previously covered by such [a] contract[ ]." The second sentence authorizes "the continuation of those specific activities for which [ISDA] contracts * * * currently exist" and "the renewal of contracts * * * for those activities." 2/ The two sentences, when read together, convey the sense that Congress intended to prohibit the use of FY 1999 funds for activities under contracts which, on October 21, 1998 (the date the 1999 Appropriations Act was enacted), had not yet been approved and thus did not "currently exist." Thus, the language of the statute appears to favor the Director's position on this issue.

The Board has found no specific discussion of this issue in the legislative history. However, House Report No. 609, 105th Cong., 2d Sess., includes a lengthy discussion of the

2/ The second sentence of sec. 328 also includes two other exceptions to the funding prohibition, neither of which is relevant here. For purposes of this decision, the Board ignores those two exceptions.

provision which became section 328. With respect to this provision, which was section 329 in H.R. 4193, the original Interior appropriations bill, 3/ the House report states in part:

> Section 329 places a one-year moratorium on new and expanded Indian self-determination and self-governance contracts and compacts.
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> * * * * * * *
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> The Committee expects the BIA and the IHS to work with the tribes and the legislative committees of jurisdiction over the next several months to find an acceptable solution to the contract support cost funding problem so that we can move forward with the self-determination and self-governance programs. In the meantime, the Committee believes that a moratorium on new and expanded contracts and compacts is the fiscally responsible course of action. * * *
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> The Committee believes the basic "fairness" question needs to be addressed with respect to how to distribute limited funds between and among the various programs and the management of those programs in BIA and IHS. The current contract support cost funding situation clearly illustrates that problem and the Committee looks forward to working with the tribes and the BIA and the IHS to find an acceptable solution to the problem.

H.R. Rep. No. 609 at 125-26.

This discussion makes it clear that the moratorium imposed by section 328 was fiscally motivated and was related to Congress' concern with burgeoning contract support costs, as well as its concern with what it saw as the inequitable distribution of contract support funds. 4/ From

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3/ Sec. 329 in H.R. 4193 did not include the two exceptions mentioned in the preceding footnote, both of which were added later by the Conference Committee (See H.R. Conf. Rep. No. 825, 144 Cong. Rec. at H11384). Otherwise, sec. 329 in H.R. 4193 is identical to sec. 328 in the enacted bill.

4/ The inequitable distribution issue apparently arose only as to IHS. H.R. 4193 included a provision that would have required IHS to allocate contract support costs to ISDA "contracts, grants, self-governance compacts and annual funding agreements each year on a pro-rata proportionate basis regardless of amounts allocated in any previous year to such contracts, grants, self-governance compacts or annual funding agreements."

A spirited debate concerning this provision took place on the House floor. 144 Cong. Rec. H6126-6131 (daily ed. July 22, 1998). Opponents contended that it would result in severe re-

the concerns reflected in the legislative history, it appears unlikely that Congress intended to differentiate between a "new contract" declined)))and thus not funded)))in FY 1998 and a "new contract" first proposed in FY 1999. In either case, if the initial need for funding had not arisen in FY 1998 or earlier, the contract would be "new" from a funding perspective in FY 1999. 5/ Thus, the legislative history also appears to favor the Director's position.

The Director argues vigorously that "there is no such thing as a retroactive contract under [ISDA] in the context of a contract declination." Director's Appeal at 8. Among other things, she points to practical problems that would arise if a contract were deemed retroactive so as to cover a period of time during which an Interior bureau or office was performing the functions covered by the contract. Id. at 12 n.10.

It seems unlikely that Mr. Garrett of the HHS Appeals Board, in stating that the approval of a contract on appeal should "relate back" to the declination under appeal, conceived of a true retroactive contract, i.e., one in which performance occurred in the past and in which funding is approved to cover that past period. It is more likely that he conceived of a contract which, although deemed to have been approved at the time of declination, would also be deemed to call for performance and funding to begin in the future, i.e., after the decision on appeal. 6/ Arguably, such a contract would still be a new contract under section 328 because performance would not have begun prior to October 21, 1998, and thus could not be "continued" as contemplated by

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fn. 4 (continued)
ductions to some already contracting tribes and would "renege on contractual obligations to all contracting tribes." Remarks of Rep. Parker, id. at H6127. See also, e.g., Remarks of Rep. Pickering, id. at H6130.

Ultimately the pro-rata provision was deleted because of objections raised by tribes. However, IHS was directed "in cooperation with the tribes, to remedy [the contract support cost distribution] inequity in the fiscal year 2000 budget request." H.R. Rep. No. 825, 144 Cong. Rec. at H11382.

5/ Of course, it might well be argued that Congress' intent in sec. 328 would be undercut if the initial funding for the Consortium's proposed contract were to come, during FY 1999, from unobligated pre-FY 1999 funds. However, while Congress might easily have prohibited the use of pre-FY 1999 funds for new contracts, it did not do so.

6/ Mr. Garrett did state, however, that the Pascua Yaqui Tribe, if its contract were to be approved on appeal, should "be entitled to the same contract as if IHS had properly approved its contract in the first instance." This statement suggests the possibility that he may have had a true retroactive contract in mind.

the second sentence of section 328. 7/ On the other hand, the contract would, under this analysis, "currently exist" as of October 21, 1998, because the approval would be deemed to have occurred prior to that date.

The "relation-back" theory has some appeal, at least if it is limited as described in the preceding paragraph. However, the Board concludes that, in the end, it is not consistent with the language of section 328. The most reasonable interpretation of section 328 is that, in order to be exempt from the funding prohibition, a contract must have "currently exist[ed]" in fact, rather than by application of a legal fiction, on October 21, 1998. This interpretation more accurately reflects the statutory language. It also comes closer to implementing Congress' evident intent to maintain the status quo (as of October 21, 1998) with respect to contract funding. Moreover, this interpretation would not result in the infringement of any existing contractual rights, a clear concern of some members of Congress, cf. n.4, supra, and would not deprive the Consortium (or other potential contractor in the same position) of any funds upon which it has come to rely either because it was already performing under a contract or because, in reliance upon an approval actually given, it had made substantial preparations for performing under the contract. Cf. n.7, supra.

Accordingly, the Board disagrees with Mr. Garrett of the HHS Appeals Board on this point and therefore disapproves Judge Kuzmack's second finding.

As stated above, the Board has affirmed Judge Kuzmack's first finding and, on that basis alone, would affirm his conclusion that this appeal is not moot.

Further, even if pre-1999 OST/BIA trust management funds have all been expended or are otherwise not available for ISDA contracts, the Board would still find that this appeal is not moot. Given that FY 2000 will begin in five months, it is likely that FY 2000 funds will be available by the time a hearing is held and a decision is issued in this case. Even if FY 2000 funds are not available at that point, the Board sees no reason why Judge Kuzmack could not issue a decision which, if it is favorable to the Consortium (and pre-1999 funds are not available), provides that the decision is to be implemented when the funding moratorium is lifted. 8/

7/ Of course, the same argument could be made with respect to a contract actually approved in FY 1998 for initiation in FY 1999. In such a case, however, the contracting tribe might well have made substantial preparations for performing under the contract, in reliance upon the approval of its contract. Moreover, the contractual rights of such a tribe would already have come into existence.

8/ The Board does not, of course, decide the question of whether the program the Consortium seeks to contract does in fact exist and thus whether funds are (or will be) available for that program. As noted above, these are central issues in this appeal and must be addressed at the hearing.

Allowing the Consortium's appeal to proceed on this basis should alleviate some of the unfairness perceived by Mr. Garrett. Indeed, the Board agrees with the statement he made in his February 11, 1999, Ruling on Request for Reconsideration:

> The effect of the moratorium for the funding of "new" contracts in the appropriations bill is time-limited. By the time [the Pascua Tribe] receives a final administrative decision on the validity of its proposal and begins to implement that proposal, the moratorium may have expired. If [the Tribe] must re-submit its proposal after the moratorium has expired, [the Tribe] could lose an additional year or more before it receives a decision on the validity of its proposal. * * * Ultimately, it would appear that the availability of funding for a contract proposal such as [the Tribe's] is something of a moving target, and that it would be unreasonable and unfair to require [the Tribe] to demonstrate the availability of full funding with absolute certainty at any given moment before allowing [the Tribe] to receive a decision on the merits of its proposal.

Ruling on Request for Reconsideration at 4.

The Consortium's response to the Director's appeal is concerned primarily with the merits of its original appeal, rather than the narrow issue presently before the Board. The Consortium also requests a second informal conference with representatives of OST. All of these are matters which may be addressed when this matter is returned to Judge Kuzmack.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 900.167, Judge Kuzmack's February 25, 1999, Order is affirmed as modified in this decision.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge